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## Equalization Under the *Family Law Act*: Risks and Benefits by David Smith and Joshua Eisen

Ontario's *Family Law Act*<sup>1</sup> (the "*FLA*") extends a right to married (but not common law) spouses, on the death of one of them, to make a choice whether to accept an entitlement under the will of the deceased spouse (or entitlement on intestacy, as the case may be), or to seek an equalization of net family property.

If the surviving spouse chooses equalization, an election must be filed in the office of the Estate Registrar for Ontario within six months after the first spouse's death. The form of the election is prescribed by regulation.<sup>2</sup> It contains basic biographical information about both spouses, and two boxes, one of which is to be checked to indicate the spouse's choice. The estate trustee should also be put on notice.

This is an option that is sometimes overlooked both by spouses and by estate trustees in the context of an estate administration. However, it is important that the surviving spouse take steps quickly to secure the right to equalization. There is a statutory limitation period of six months after the first spouse's death, after which an application for equalization under the *FLA* may no longer be sought.<sup>3</sup>

A full exploration of the definitions and calculations involved in measuring a spouse's net family property is beyond the scope of this article, but a brief, general explanation is warranted. Essentially, an equalization of net family property is accomplished by measuring the change

in the property held by each spouse over the course of the marriage, subject to certain exceptions, and then averaging it out between the two of them. The *FLA* defines "net family property" by measuring the value of all property, except property excluded under section 4(2) of the *FLA*, that a spouse owns on the valuation date, less the spouse's debts and liabilities at the valuation date, and then subtracting the value of the spouse's property on the date of marriage (less debts or liabilities as of the date of marriage).<sup>4</sup> The valuation date, in the case of a married couple cohabiting until the date of death, is the date before the date on which the decedent spouse passes away.<sup>5</sup> There are special rules relating to the matrimonial home, and careful attention must be paid to the technical definitions under the *FLA* and the list of excluded property to ensure that net family property is accurately and appropriately measured for each spouse. Net family property is calculated separately for each spouse. If the net family property of the deceased spouse exceeds that of the surviving spouse, the survivor is generally entitled to one-half of the difference between them.<sup>6</sup>

Much care must be taken in advising a spouse on whether to make an election under the *FLA*. Making the wrong choice can be very costly, so it is important to look closely at the facts and the law to double-check the math.

**Continued on back**

Where a surviving spouse also receives money as a beneficiary of life insurance taken out on the life of the deceased spouse, or where jointly held property passes to the surviving spouse by right of survivorship, sections 7(6) and (7) of the *FLA* may apply. These sections provide that these amounts may be credited against the surviving spouse's entitlement on equalization.<sup>7</sup> Alarmingly, if the total amount of the credit under these sections is greater, the *FLA* appears to give the estate's personal representative the right to recover the difference from the surviving spouse.<sup>8</sup>

Accordingly, even where the surviving spouse receives little under the will, it may be unwise to elect in favour of equalization without taking the time to investigate the circumstances and to run through the calculations. There may be better alternatives for a spouse who receives little or nothing under the will, including an application for dependant's support under Part V of the *Succession Law Reform Act*.<sup>9</sup>

Notably, the deceased spouse can also provide that the survivor's entitlements under the *FLA* may be received in addition to entitlements under a will, insurance, or by joint tenancy.<sup>10</sup> Otherwise, gifts under the will are deemed to be revoked and the will should be read as if the survivor had predeceased.<sup>11</sup>

Six months from the death may not be enough time to fully investigate, evaluate all of the assets and compare a spouse's entitlement on equalization to that under the will. This is especially true where there is a dispute over the validity or interpretation of a will. It is often advisable to bring a motion to extend the time to make an election beyond six months, rather than to risk making the wrong choice.<sup>12</sup>

The option to take under the *FLA* rather than under the will is an important tool in protecting the rights of married spouses in circumstances where they have been left in a difficult financial position by the death of a husband or wife and careful consideration should be given to the risks and benefits of making the election.

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<sup>1</sup> R.S.O. 1990, c. F.3 [FLA].

<sup>2</sup> *Election of Surviving Spouse*, R.R.O. 1990, Reg. 368, Form 1.

<sup>3</sup> *FLA*, s. 7(3)(c).

<sup>4</sup> *Ibid.*, s. 4(1).

<sup>5</sup> *Ibid.*, s. 4(1).

<sup>6</sup> *Ibid.*, s. 5(2).

<sup>7</sup> *Ibid.*, s. 6(6), (7).

<sup>8</sup> *Ibid.*, s. 6(7).

<sup>9</sup> R.S.O. 1990, c. S.26.

<sup>10</sup> *FLA*, s. 6(5), (7).

<sup>11</sup> *Ibid.*, s. 6(8).

<sup>12</sup> *Ibid.*, s. 2(8).



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